

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: : 13-22050 (RDD)
ROMAN SLEDZIEJOWSKI, :
Debtor. : November 20, 2015
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O'TOOLE AS CHAPTER 7 TRUSTEE, :
Plaintiff, :
v. : Adv. No. 13-08207 (SHL)
MYPLACE DEVELOPMENT, et al., :
Defendants. :
-----X
In re: : 13-22748 (RDD)
INNOVEST HOLDINGS, LLC, :
Debtor. :
-----X
O'TOOLE, CHAPTER 7 TRUSTEE OF THE :
ESTATE, :
Plaintiff, : Adv. No. 15-08208 (SHL)
v. :
MYPLACE DEVELOPMENT, et al., :
Defendants. :
-----X
O'TOOLE, CHAPTER 7 TRUSTEE OF THE :
ESTATE, :
Plaintiff, : Adv. No. 15-08273 (SHL)
v. :
MYPLACE DEVELOPMENT, et al., :
Defendants. :
-----X

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3 TRANSCRIPT OF DOCUMENT #22 MOTION TO DISMISS
4 ADVERSARY PROCEEDING
5 BEFORE THE HONORABLE SEAN H. LANE
6 UNITED STATES BANKRUPTCY JUDGE

7 APPEARANCES:

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1 (Proceedings began at 11:00 a.m.)

2 THE COURT: So everybody is here for the 11:00
3 o'clock matters, which are -- involve adversary proceedings in
4 two Chapter 7 cases: Roman Sledziejowski and Innovest
5 Holdings, LLC. I know we have a motion, at least we -- some
6 things on that we're going to have hearings on, but I thought
7 what I'd first to is get appearances from everybody and then
8 get a status of where things are generally.

9 So let me get appearances starting this side of the
10 room and going that way.

11 MR. NEIER: Good morning. David Neier and M. K.
12 Turner on behalf of the named non-John Doe defendants, I guess
13 is the best way to say it.

14 THE COURT: All right.

15 MR. NEIER: In the adversary proceedings.

16 THE COURT: Thank you.

17 MR. RIGANO: Good morning, Your Honor. Nicholas
18 Rigano from Lamonica Herbst & Maniscalco, the Chapter 7
19 Trustee.

20 MR. MANISCALCO: Good morning, Your Honor. Joseph
21 Maniscalco, Lamonica Herbst & Maniscalco on behalf of the
22 Trustee.

23 MS. O'TOOLE: Good morning, Your Honor. Marianne
24 O'Toole, the Trustee.

25 THE COURT: All right. Good morning to you all.

1 Please be seated.

2 So maybe you could give me just anything else that
3 we should discuss before we get to the actual motion that we
4 need to address or is there nothing else?

5 MR. RIGANO: Your Honor, I think there is one
6 housekeeping matter that's been addressed --

7 THE COURT: All right.

8 MR. RIGANO: -- that we've asked come back from
9 yesterday. There were actually two adversary proceedings that
10 were initially commenced by the Chapter 7 Trustee, hence, the
11 two defendants --

12 THE COURT: Right.

13 MR. RIGANO: Two of those adversary proceedings
14 we're doing them today and the third related to a single
15 transfer made by Innovest, fraudulent transfer actions arising
16 therefrom.

17 Initially the named defendants filed a motion to
18 dismiss where the Trustee amended the complaint to answer
19 those defendants' needs to adversary proceedings that were on
20 today. When amending Trustee's complaint Trustee included
21 that single transfer in the complaints here today.

22 THE COURT: All right.

23 MR. RIGANO: And so it's -- the same causes of
24 action it set forth in that third complaint are at issue in
25 the complaints that were --

1 THE COURT: All right. So is there an intent to
2 drop that case or is it just to follow form with whatever
3 happens in these meetings?

4 MR. RIGANO: Well, the named defendants filed a
5 motion to dismiss in that case as well. As contemplated by
6 the parties that motion to dismiss will be adjourned.
7 However, as Your Honor's decision here today, somehow it
8 impact a sole transfer, which we call the Innovest transfer in
9 this case at that decision, which would also affect that
10 adversary proceeding as well.

11 THE COURT: All right. And that's the transfer to
12 Innovest?

13 MR. RIGANO: No, the transfer made by Innovest --

14 THE COURT: Transfer made --

15 MR. RIGANO: -- and MyPlace Development in the
16 amount of 1.3 million dollars.

17 THE COURT: Ah, I gotcha. Okay. All right. That's
18 fine. And is that the 15-8273 adversary?

19 MR. RIGANO: Yes, Your Honor.

20 THE COURT: All right. So I'll consider that
21 adjourned for today. Does that make sense from defendant's
22 counsel's point of view?

23 MR. NEIER: Yes, Your Honor. We think it's so that
24 the request [indiscernible].

25 THE COURT: All right. Yeah, it's fine. Obviously,

1 whatever happens here is -- to the extent that they are the
2 same issues somewhere else, I would -- I think everyone
3 expected it to be the same result. So it makes sense to not
4 worry about it, at least for purposes of today.

5 So that leaves the motions that are filed in these
6 two cases which are on for argument today, right?

7 MR. RIGANO: That's right, Your Honor.

8 THE COURT: All right. So it is defendant's motion
9 and so I will -- let me hear from them first. And let me just
10 say, I think I have a sense of the transactions, so I just --
11 I just want to make -- there are a couple of things that would
12 be helpful to hear about is there's some discussion about
13 what's challenged and what's not challenged.

14 And as far as I can tell, there's sort of three
15 transactions at issue here. There's some background, which is
16 the ownership in the MyPlace entity, which I guess is two
17 entities, but it's referred to as MyPlace and it's defined as
18 two, and then there's Innovest loan and money to MyPlace, and
19 there's the three transactions that I understand to be part of
20 this series of allegations that Mr. Sledziejowski transferred
21 an equity interest to Kulczyck Real Estate Holdings for sort
22 of a nominal sum; that TWSIP, I don't know if we're going to
23 refer to them as that or TWS Investment Partners, assigned
24 rights under the loan to Kulczyck Real Estate Holdings, and
25 that was -- those -- both those transactions happened

1 December 3rd of 2009; and then there was Kulczyck Real Estate
2 Holdings paying Innovest 50 percent of the outstanding loan
3 balance and that actually occurred, according to the
4 allegations, December 7, 2009.

5 So it's -- there's some difference. I couldn't
6 quite figure out as to who paid that, whether it was Kulczyck
7 Investments or which I think is -- was Kulczyck -- another
8 Kulczyck entity, Kulczyck Holdings. I think there seems to be
9 some daylight between the two parties on that, but I don't --
10 I mean, so it would be helpful, one, is if I got any of the
11 background wrong, please straighten me out. I just wanted to
12 lay it out to express what I -- my understanding is of what
13 the facts are.

14 And two is, there was some discussion about what's
15 challenged, what's not challenged as part of the case, so
16 would appreciate some clarity on that issue. And then when we
17 get into personal jurisdiction, obviously there are a number
18 of defendants and it'd be helpful to talk about the contacts
19 and the activities defendant by defendant and if there's any
20 attempt to -- or thought that it's appropriate to aggregate
21 contacts to explain how that works, what contacts are being
22 aggregated for who, why, and what's the basis for that.

23 And then I think the other issues are set out in the
24 complaint. Obviously, whatever you want to tell me. I think
25 the other big issue, safe harbor was to whether this was a

1 settlement payment, which I think has to go with what's
2 challenged or not challenged, but -- so those are some of the
3 things I was thinking about. It probably comes as no surprise
4 to any of you and so with that, let me hear from defendant's
5 counsel.

6 MR. NEIER: Yes, Your Honor. Give me one second.

7 Let me [indiscernible].

8 So in terms of the number of transactions, I don't
9 think there actually is a factual disagreement. There was a
10 loan, which is written in Polish, but we've provided an
11 English translation of the loan, made by TWSIP to the MyPlace
12 entities. The loan was made in three tranches and each one of
13 those tranches was then assigned to the KREH entity in one
14 transaction, even though it's written in three agreements
15 because it was written think an assignment agreement for each
16 one of the tranches of the loan and one wire transfer was made
17 in respect to all three tranches.

18 And then the second transaction, which Your Honor
19 referred to, is the sale of the equity which -- is that
20 Mr. Sledziejowski's personal investment? It was a 25 percent
21 equity investment that was then transferred.

22 MR. RIGANO: That's correct.

23 MR. NEIER: Per -- and I think the -- I think we can
24 take a -- as a given that 2,500 zlotys is not worth very much.

25 THE COURT: All right.

1 MR. NEIER: So, Your Honor, we think a lot of the
2 complaint has factual inaccuracies and really doesn't go to
3 the heart of this matter. But I think if you parse through
4 the complaint it's what we just talked about. It's the
5 allegations that TWSIP made loans to MyPlace. Now, those
6 loans are debt and equity investments in MyPlace. They're not
7 property of the -- MyPlace does not have any property interest
8 that -- in respect to the debtor. If this was under the
9 Bankruptcy Code, this would be pretty easy because, of course,
10 under the Bankruptcy Code the debtor could only sue for
11 property interests of the debtor and an investment in an
12 entity for any kind of debt in equity investments in an entity
13 is not property of the estate.

14 What's property of the estate is the equity and debt
15 investment, not anything involving the entity itself. So we
16 don't think that MyPlace could be a proper defendant, no
17 matter what you do, because it's not a property interest of
18 the estate. But that's just speaking as a bankruptcy lawyer.

19 So there are these debt and equity investments that
20 are made in Polish real estate and development companies. In
21 2009 TWSIP and Mr. Sledziejowski decided to liquidate their
22 investments. TWSIP liquidates its debt investments and
23 Mr. Sledziejowski liquidates his 25 percent equity interest in
24 the MyPlace entities. They do so to a Polish investment
25 company, Polish real estate investment company, in agreements

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1 governed by Polish law. So the original investments were --
2 in reading the complaint in Polish farmland with the idea that
3 that Polish farmland would be re-zoned and developed and
4 developed into residential housing. And those agreements were
5 governed by Polish law exclusively and they were in Polish and
6 it was just an investment by a U.S. entity, if you will, in
7 Poland. The transfer of those -- or the assignment of those
8 investments was made in 2009 and the Trustee believes that
9 they were for less than fair consideration.

10 Now, we challenged the jurisdiction of the
11 complaint. The Trustee then amended the complaint. We
12 accepted service of the complaint just for the purpose of
13 challenging personal jurisdiction, but we figured for the
14 Court's convenience, for the Trustee's convenience we would
15 challenge the entirety of the complaint at this juncture, just
16 to make it easy for everybody.

17 With respect to personal jurisdiction, I think the
18 Court is well aware of the tests from the Arcapita case, which
19 while different facts is essentially the same law. And I
20 don't think there's a disagreement with the Trustee as to the
21 applicable law. If there's a disagreement, it's the
22 application of the facts to the law.

23 So the test is for personal jurisdiction that there
24 must be minimum contacts, minimum contacts can be established
25 by general jurisdiction or specific jurisdiction and then

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1 after that the Court makes a second inquiry as to whether it's
2 reasonable for the Court to exercise personal jurisdiction
3 over the defendants.

4 Here, there are a lot of allegations in the
5 complaint about general jurisdiction, but the Trustee has
6 conceded in opposition to the motion to dismiss that there is
7 no general jurisdiction and we look at specific jurisdictions.
8 So all these allegations about the fact that
9 Mr. Sledziejowski -- or the allegations that Mr. Sledziejowski
10 and Mr. Kulczyck were friends, that they grew up together in
11 Poland, that they socialized together, that Mr. Kulczyck's
12 wife was friends with Mr. Sledziejowski in Poland, none of
13 that really matters for specific jurisdiction.

14 With respect to specific jurisdiction, you look at
15 other suit-related conduct and whether the parties personally
16 availed themselves of the jurisdiction of the U.S. and that --
17 that's not just the defendants who allege that that's the
18 correct law; it's the Trustee who alleges that.

19 So the Trustee says in their opposition that the
20 defendants -- and I'm reading from page 7 of their
21 opposition -- the defendants' suit-related conduct with the
22 forum must form the basis for specific jurisdiction. And then
23 they have a quote from the -- from one of the Madoff cases:

24 "Specific personal jurisdiction exists where a
25 foreign defendant personally directs his activities at

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1 residents of the forum and the underlying cause of action
2 arises out of those -- arises out of or relates to those
3 activities. Where the claim arises out of or relates to
4 the defendants' contacts with the forum, i.e., specific
5 jurisdiction it asserted, minimum contacts necessary to
6 support such jurisdiction exists where the defendant
7 purposely availed itself of the privilege of doing
8 business in the forum and could foresee being haled into
9 the court there."

10 And that's from page 7 of the Trustee's opposition and we
11 would agree that that is the correct statement.

12 Here, other transactions which the Trustee alleges
13 occurred, including investments in the pension account, their
14 friendship, other allegations which while we didn't submit
15 affidavits in opposition to the allegations, which we could do
16 on a personal jurisdiction motion to dismiss, but we are
17 relying on the facts that's alleged in the complaint, there
18 are a lot of incorrect facts. They seem to be confusing.
19 Mr. Kulczyck's -- Mr. Kulczyck with his father, who actually
20 died of complications of surgery between the time of the
21 original complaint and the amended complaint. So when you
22 look at specific jurisdiction, that is the suit-related
23 conduct that indicates that the defendants purposely availed
24 themselves of this forum, you have very little.

25 With respect to the MyPlace defendants there are no

1 allegations that they had any contact with this forum.
2 Rather, it's Mr. Sledziejowski and TWSIP who make investments
3 in those entities overseas. With respect to the Kulczyck
4 Investments, and Your Honor asked something about Kulczyck
5 Investments, there are no allegations. The only allegation is
6 that -- and I believe it's in the opposition brief that on the
7 website Kulczyck Investments is listed as a parent company.

8 With respect to --

9 THE COURT: A parent company of who?

10 MR. NEIER: I believe it's KH is what the -- it's a
11 footnote in the -- I believe it's page 12 of the brief. Yeah.
12 So page 12, footnote one, it says, "While" -- it says, "While
13 defendant Kulczyck Investments was not a named party to the
14 agreements, for the purposes of personal jurisdiction the
15 actions of an agent may be attributed to the principal.
16 According to defendant's Kulczyck Investments' website,
17 defendant Kulczyck Investments is the parent of KREH.

18 THE COURT: All right.

19 MR. NEIER: That's the allegation. And I believe
20 it's in the opposition brief, not in the complaint. So there
21 are no allegations as to MyPlace. There are no allegations as
22 to Kulczyck Investments.

23 With respect to KREH, KREH is alleged to be a Polish
24 real estate company which makes investments in Polish and in
25 central and eastern European real estate and that it entered

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1 into equity debt investments with TWSIP, which is a U.S.-based
2 entity or a dissolved U.S.-based entity.

3 With respect to KH or Kulczyck Holdings, the
4 allegation is that they wire -- and I think you were asking
5 about the wire transfer, Your Honor -- the allegation is that
6 Kulczyck Holdings wired funds on behalf of KREH to the U.S.,
7 to the Bank of America account of TWSIP. I'm sorry. That's
8 not correct. To the bank account of Innovest for the benefit
9 of TWSIP and that's from the wire transfer, which I believe
10 was submitted before Your Honor as part of the affidavit in
11 support of the motion to dismiss.

12 With respect to Mr. Kulczyck, there are really very
13 few allegations that are specific jurisdiction related as
14 suit-related conduct indicating that they purposely availed
15 themselves in the forum.

16 The only allegation is that there were a couple of
17 emails sent between -- and we don't have the full text of the
18 emails. The emails were not submitted, they're not attached
19 to the complaint. We don't know in what context they were
20 made. We don't know if the quotes are accurate or whether
21 they've been ellipsized in some manner. But the allegation is
22 that they had two emails between Mr. Kulczyck and
23 Mr. Sledziejowski in negotiating the agreement. Obviously you
24 can access an email account from anywhere in the world, so
25 it's not evidence that Mr. Sledziejowski was in the United

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1 States and it's not evidence that Mr. Kulczyck was in the
2 United States. It's just an allegation that they had an email
3 exchange.

4 From our standpoint, those facts, that is the actual
5 facts that related to suit-related conduct here in the United
6 States, are insufficient as a matter of law to establish
7 personal jurisdiction under the first test, which is general
8 and specific or the two-part inquiry. The first inquiry is
9 minimum contacts. We don't believe there are minimum
10 contacts. The Trustee has conceded that there's no general
11 jurisdiction. With respect to specific jurisdiction the only
12 allegations are the ones that we've outlined. We don't
13 believe those constitute minimum contacts under the specific
14 jurisdiction inquiry.

15 The second part of the test is whether or not it's
16 reasonable for the Court to exercise personal jurisdiction
17 here and these are investments in Polish real estate pursuant
18 to agreements with a Polish entity governed by Polish law made
19 by TWSIP. And then we have the assignment of those
20 investments, the debt and equity investments to KREH, which is
21 alleged in the complaint to be a Polish real estate
22 development company, investment company doing business in
23 Poland, making investments in Poland, eastern and central
24 Europe governed by Polish law.

25 What happened here is that it is the Trustee's

1 debtors, that is, TWS -- well, it's -- TWSIP is not a debtor
2 but it is the parent company of TWSIP and Mr. Sledziejowski
3 who availed themselves of the laws of Poland and availed
4 themselves of the jurisdiction of Poland, not the other way
5 around. It's not the defendants here who availed themselves
6 of the jurisdiction of the U.S. This is simply a U.S. entity
7 that made investment that turned south in 2009 and they
8 decided to liquidate that investment to a Polish entity, so
9 it's a Polish investment liquidated to a Polish entity.

10 The fact that there was a wire transfer here in the
11 United States, which the Trustee later disavows as part of
12 their allegations of their complaint, and the fact that the
13 investment was for less than fair consideration does not
14 establish suit-related conduct here in the United States or
15 that the defendants purposely availed themselves of the forum
16 here in this jurisdiction.

17 I don't know how the judge -- how Your Honor wants
18 to handle this. Do you want us to go on and talk about the
19 remainder of the complaint?

20 THE COURT: Yeah. I would do that. Let me ask you
21 about the -- there's some discussion about the mere department
22 doctrine and you made the point that there's no allegation of
23 alter ego. Certainly it seems under everyone's understanding
24 of the facts that certain parties are acting on behalf of
25 other parties. So, in your view, is it appropriate to

1 aggregate any conduct of some of the entities, some of the
2 defendants in terms of understanding and assessing personal
3 jurisdiction? So, for example, you have this -- I think
4 everyone says it's essentially -- you say it's two
5 transactions; they say it's three, but it -- I think we all --
6 we all know what they are.

7 MR. NEIER: Whether it's a series of transaction --

8 THE COURT: Yeah.

9 MR. NEIER: -- or one transaction --

10 THE COURT: Yeah. It's -- well, you say it's -- two
11 of them are the flip side of the --

12 MR. NEIER: Right.

13 THE COURT: -- same transaction. Again, but
14 there -- everyone agrees to what they are.

15 MR. NEIER: Right.

16 THE COURT: So, for example, KREH --

17 MR. NEIER: And they all occur in the same day at
18 the same time.

19 THE COURT: Right. So KREH seems to be the party to
20 the transaction, the actual named party.

21 MR. NEIER: That's the counter-party.

22 THE COURT: The counter-party. But at the same time
23 there are emails from Mr. Kulczyck that certainly appear to
24 relate to the actual transaction. Putting aside whether they
25 actually do anything for the -- for personal jurisdiction, I'm

1 just trying to figure out whether -- so they seem to relate to
2 these transactions and then there also seems to be a payment
3 that's made and it appears to be Kulczyck Holdings and that's
4 the payment down for what is called Kulczyck Investment.

5 Again, I'm a little confused about that.

6 But what -- an entity other than KREH makes the
7 payments.

8 MR. NEIER: Kulczyck Holdings on behalf of -- is the
9 allegation of the complaint, Kulczyck Holdings.

10 THE COURT: On behalf of KREH?

11 MR. NEIER: Correct, Your Honor.

12 THE COURT: So -- and that's the seven million
13 dollars. So just looking at what everybody says is undisputed
14 does it make sense, and if so -- if not, why not, to aggregate
15 the actual transaction that the transfer of the money and the
16 emails for purposes of understanding specific jurisdiction.

17 MR. NEIER: Well, first of all, Your Honor, the
18 Trustee actually states in their opposition brief that they
19 don't have sufficient evidence to make out the mere department
20 allegation and they're requesting discovery to try and make
21 out the mere department allegations. So they don't believe
22 that they have sufficient evidence to -- or a sufficient basis
23 to make the mere department allegations.

24 THE COURT: Well, let me just put it aside for --
25 let me put that -- set that --

1 MR. NEIER: Well, our --

2 THE COURT: -- label aside for a second because --

3 MR. NEIER: Yeah.

4 THE COURT: -- it's -- in a way it's a bit
5 distracting. But just evaluating it without any labels does
6 it make sense to do this or not in terms of understanding the
7 conduct where you just say, well, it's all part of one
8 transaction and these different actors are all acting in --
9 together to accomplish this transaction. Nothing particularly
10 unusual about that. That happens all the time.

11 MR. NEIER: Yes.

12 THE COURT: But for purposes of assessing --
13 assessing contacts because it is one series of transactions
14 accomplished with a number of different entities, one
15 individual and two companies -- whichever two companies,
16 you're choosing KREH and somebody else --

17 MR. NEIER: Right. I think we're --

18 THE COURT: -- does it make sense to evaluate them
19 together.

20 MR. NEIER: I think I would say, Your Honor, that
21 even if you were to do so you would still come to the same
22 answer. That is, if you aggregated all of the contacts
23 involving KH, KREH, and Mr. Kulczyck, I don't know if you
24 could really allocate -- I don't think you could aggregate
25 Kulczyck Investments or MyPlace into those. But if you

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1 aggregate just KREH, KH and Mr. Kulczyck, you still don't have
2 enough because you're still talking about an investment in
3 Polish real estate that's then assigned to a Polish entity and
4 in an agreement governed by Polish law.

5 So even if you were to aggregate those three, that
6 is Mr. Kulczyck, Kulczyck Holdings and KREH, you still do not
7 have enough. The only allegation against KH is that they sent
8 the wire. That's the only allegation against them.

9 But if you were to aggregate that with KREH, all
10 KREH was -- is the counter-party to the agreements which are
11 governed by Polish law, they're a Polish company, they're
12 buying an investment -- a debt and equity investment in
13 Poland.

14 And then if you add Mr. Kulczyck and this email
15 exchange that is alleged to have occurred between
16 Mr. Sledziejowski and Mr. Kulczyck, even go -- parsing through
17 those emails you don't get to minimum contacts because
18 Mr. Kulczyck says in his email they are willing to offer X and
19 Mr. Sledziejowski replies or, you know, says in another email,
20 "I know you're worried about buying this investment at a
21 discount." And personally I don't think that a defendant who
22 is concerned about the insolvency of its counter-party, that's
23 a good thing, not a bad thing and that doesn't raise some kind
24 of specter that they're engaged in a fraudulent activity.
25 Quite the contrary.

1 THE COURT: Well, I guess from my purposes, I don't
2 even have to get into it.

3 MR. NEIER: Yes, you don't.

4 THE COURT: So I just look at the emails and say --

5 MR. NEIER: Right.

6 THE COURT: -- where's the contact happening, what
7 does it mean. And I understand your view to be that the
8 emails, at least as described, don't establish any conduct in
9 the -- with the contact with the forums.

10 MR. NEIER: There's no way to tell where an email is
11 accessed or at least on the facts alleged in the complaint
12 there's no way to tell where an email is accessed, where it's
13 sent from or to, where each party was located or even, for
14 that matter, anything else about the -- involving the emails.
15 In this day and age we don't even know where the servers are
16 located. So --

17 THE COURT: So what are you --

18 MR. NEIER: -- even if you were to aggregate those
19 three.

20 THE COURT: Let me ask. So it could be that there's
21 additional information about the emails that might tell you
22 something. For example, if there's an email address, that
23 email address is to accompany the United States, that would be
24 a contact. You might say it's an insufficient contact, but
25 you might learn something by an email address, you might not;

1 depends on what it is.

2 MR. NEIER: You might not; you might.

3 THE COURT: All right. Fair enough. All right. I
4 think that was my big question about personal jurisdiction.

5 MR. NEIER: Right. As I said, Your Honor, I think
6 the Court is familiar with the test. We think that we don't
7 have a disagree with the Trustee on the test. We think it's
8 outlined in the Lehman and Arcapita cases. In particular,
9 obviously they're based on the Walden case by the U.S. Supreme
10 Court and --

11 THE COURT: Let me ask. I was having a debate with
12 people in chambers about whether Walden actually signals any
13 change in the law. I frankly don't read it that way. I read
14 it to be sort of an unusual set of facts which I may comment
15 on things and basically say, under this -- these set of
16 circumstances the only thing you have is the fact that the
17 particular party resides in a foreign state because all the
18 other conduct was somewhere else.

19 MR. NEIER: There's no question that as a Bivens
20 action the Walden case is completely different on the facts
21 and, yet, it's -- and it's not a change in the law. It's just
22 a U.S. Supreme Court that's most recent that everybody goes
23 to --

24 THE COURT: Right. All right.

25 MR. NEIER: -- to state what the law is.

1 THE COURT: I think that's fair enough. I actually
2 have another case where someone is wanting to see change and I
3 frankly just don't see it, but --

4 MR. NEIER: Well, I would say to see change in this
5 in that you could argue that the way New York law, not federal
6 law but New York law, says there should be personal
7 jurisdiction might be affected by the standard outlined in
8 Walden, but that's not before Your Honor.

9 THE COURT: Right.

10 MR. NEIER: That's not really --

11 THE COURT: Right. Yeah, how you'd understand the
12 long-arm statute in terms of --

13 MR. NEIER: Correct.

14 THE COURT: -- doing business and I can see that.
15 All right. So let's move on I guess to whatever else we need
16 to address and certainly maybe we could start with safe
17 harbor.

18 MR. NEIER: So the safe harbor, every bankruptcy
19 judge's favorite having to deal with. So what we said in our
20 motion to dismiss is this is a settlement payment. Clearly
21 it's a settlement payment for securities and settlement
22 payment is broadly interpreted. And it's by or to or for the
23 benefit of a financial participant, which is also broadly
24 determined here. And Kulczyck Holdings, as a real estate
25 development company, Kulczyck Investments as an investment

1 company, and all of this is alleged in the complaint, and I
2 could go through the specific allegations but that's what the
3 allegations are, that would be, you know, a payment, too. And
4 then, of course, we don't have any allegations as to what
5 Innovest or TWSIP are in the complaint, although they do cite
6 a [indiscernible] proceeding involving Mr. Sledziejowski,
7 Innovest, TWSIP. It's fair they were probably in the
8 investment game as well.

9 And so we think that under the first standard, that
10 is, a settlement payment by or to or for the benefit of a
11 financial participant, which is an incredibly broad standard,
12 you're probably there. But even if you were to say there's
13 some, you know, quibble about what is a financial participant,
14 clearly, you know, there may be an allegation that some of the
15 other terms, stockbroker or commodities broker, et cetera, et
16 cetera, apply, financial institution. But clearly, if you
17 were to just take out that standard and you went to the second
18 standard for 546(e), which is a transaction involving
19 securities or in connection with a sale of securities by or to
20 the benefit of a financial institution, you're there because
21 the complaint alleges that the wire transfers made to Bank of
22 America. Bank of America is a financial institution as
23 defined in the Bankruptcy Code because it's an FDIC insured
24 institution.

25 And so you have a securities transaction buyer to or

1 for the benefit of a financial institution and the way the
2 courts have interpreted that is even if the financial
3 institution is a mere conduit, even if it's just a wire
4 transfer, it's still governed -- it's still governed by
5 546(e). A lot of people don't like that. A lot of people
6 think that Congress missed it, but that's a complaint to
7 Congress.

8 Now, the Trustee comes back on -- in opposition to
9 the motion to dismiss and says, well, we're not suing on the
10 actual wire transfer. We're only suing with respect to the
11 transfer of the loan agreements, but we're not suing on the
12 consideration that was made for the loan agreements. Now, we
13 think that completely guts their complaint. We think it
14 completely guts --

15 THE COURT: Say that again. And this is, I think,
16 important because I had it listed just because it --

17 MR. NEIER: Yeah.

18 THE COURT: -- I wanted to make sure I got it right.
19 So they're not suing on the wire transfer, which is when one
20 of the Kulczyck entities wire transfers seven million dollars
21 to Innovest in the U.S. Is that what you mean by that?

22 MR. NEIER: Well, what the Trustee says is that they
23 were only suing with respect to the transfer of the debt and
24 equity investments in MyPlace and this is in -- this is in the
25 opposition brief obviously, but they're not suing with respect

1 to the transfer of the funds itself and, therefore, 546(e)
2 does not apply.

3 First of all, we don't think you can do that because
4 the complaint clearly says -- and I'll quote from paragraph
5 112 of the complaint -- the amount of the KEH transfer
6 constitutes less than fair consideration for the total amount
7 owed under the tranche loans. You know, I don't know how you
8 could allege that without talking about the wire transfer.

9 And frankly, I don't know how you can sue just with respect to
10 the transfer of the debt and equity investments in the MyPlace
11 entities without talking about what was paid for it. That's
12 sort of like, you know, somebody buys a bagel for 25 cents and
13 you say, well, I'm just suing for the bagel and the 25 cents
14 you paid is irrelevant.

15 So we think that you can't avoid 540 -- it's novel
16 and I haven't seen a case like it, but I don't think you could
17 avoid 546(e) by simply saying, oh, that's not going to be part
18 of our complaint. And even beyond that, what that does to the
19 jurisdiction elements since you've just eliminated the wire
20 transfer into the United States by these entities and what it
21 does to the other allegations in the complaint would
22 completely undermine the complaint.

23 THE COURT: All right.

24 MR. NEIER: Once you get into the standard of 546(e)
25 then it becomes a really tricky exercise I think these days to

1 figure out what's covered by 546(e). So clearly within the
2 real house of 546(e) are all constructed fraudulent claims --
3 all constructive fraud claims.

4 Then you go to the outer bands of 546(e), which some
5 people have challenged. I think the easier one is claims that
6 are end runs around 546(e) in the safe harbor in 546(e) such
7 as unjust enrichment, turnover, monies had, received, et
8 cetera, the other alle -- the other counts in the complaint.

9 We think the law is pretty clear that those end runs
10 cannot be permitted, but that issue may be cognitive on by the
11 Second Circuit in the Tribune and Sencrew [ph.] case. It's
12 not really before the Second Circuit and cases like Heckinger
13 and other cases, [indiscernible], would say that that's
14 clearly an impermissible end run around 546(e).

15 The outer band, if you will, is whether or not
16 intentional state law broad claims can be subject to the safe
17 harbor in 546(e). Obviously you have Judge Glenn, Judge
18 Gerber, Judge Sullivan in the District Court disagreeing in
19 whole or in part. We have Judge Rakoff and some other judges
20 who have said, no, Congress means what it says and the
21 statute, 546(e) reads, "Notwithstanding Sections 544" and
22 since those are the first three or four words in the 546(e),
23 you can't sue at all under 544, which means you can't sue even
24 for intentional state law fraud claims.

25 I would note the Tribune was argued November of

1 2014, so it's been over a year. It was November 3, 2014.
2 There hasn't been a decision. Oral argument was very much in
3 favor of the defendants, but there hasn't been a decision. So
4 clearly, something is up.

5 Since then, Judge Glenn in the Hallis case and I
6 believe Judge Gerber just reaffirmed his decision in Lydell
7 [ph.] in state law intentional fraud claims. Actually, he
8 said that even constructive fraud law claims should not be --
9 under state law should not be subject to 546(e) because
10 they've been around since time immemorial.

11 So there is this dispute that's going on and it has
12 been argued in front of the Second Circuit. We're all
13 awaiting the decision in Tribune [indiscernible].

14 THE COURT: All right.

15 MR. NEIER: With respect to turnover, we -- we're
16 not sure if you need to reach this, but if you do, we don't
17 think turnover can -- you know, turnovers for undisputed
18 property that's held by a counter-party, not for something
19 like this where you're alleging six years later that there was
20 less than fair consideration paid.

21 With respect to unjust enrichment -- and, by the
22 way, turnover, unjust enrichment, the state law claims, they
23 all -- they all presume that New York law applies. And our
24 contention is that it will be the law of Poland that would
25 apply. So even if this court were to find that there was

1 personal jurisdiction, we think the Court should be applying
2 the laws of Poland and not the laws of New York with respect
3 to these claims.

4 I think the Trustee has said that their turnover
5 claim based on -- or their accounting claim is only based on
6 Section 542 of the Bankruptcy Code. As such, it would rise
7 and fall with their turnover claim so it'd have to be, once
8 again, an undisputed claim.

9 With respect to unjust enrichment, there's clearly
10 contracts here. You can't have an unjust enrichment claim
11 when you have a contract. Trustee says it's an alternative
12 remedy, but we think once there's an adequate remedy of law
13 which is what actually the Trustee is suing for, you can't
14 have an unjust enrichment claim.

15 Injunctive relief, I think the Trustee admits that
16 at this stage -- at this juncture they have no basis to assert
17 an injunctive relief claim. They're simply putting it out
18 there as a placeholder and they're not seeking a preliminary
19 injunction. They're only seeking a permanent injunction. We
20 don't even think they can allege a permanent injunction
21 without actually alleging what's required.

22 For intentional state law, I think I've covered
23 this, but we don't think it's -- we don't think that the
24 complaint sufficiently alleges intentional state law claims
25 putting aside 546(e) and whether it covers state law claims.

30

1 Under Rule 9B you have to state who, what, when, where, how
2 and why. For each defendant, particularized allegations, we
3 don't think the complaint does that.

4 And then we come to TWSIP. Delaware law says that
5 once the Secretary of State of Delaware has issued a
6 certificate of dissolution, that entity can no longer be sued.

7 Now, there's a metaphysical problem with me arguing
8 this: number one, I don't represent TWSIP; and number two,
9 who could represent TWSIP? I doesn't exist. So in other
10 cases involving Delaware, whether or not an entity could or
11 could not be sued under Delaware law, the Delaware courts have
12 accepted other people standing up and saying, Your Honor, this
13 entity has been dissolved, a certificate of dissolution has
14 been issued and, therefore, the entity cannot be sued.

15 So I'd ask Your Honor to take it the way Delaware
16 courts do and Judge Chapman did in the Boston Generating case,
17 which is they just do. They just allow it. But technically
18 or actually, I don't represent TWSIP and I don't think anybody
19 could, so they are defenseless. And I think that's what
20 Delaware had in mind. Once they issue a certificate of
21 cancellation no one can represent TWSIP and that's why they
22 cannot be sued and, of course, if TWSIP cannot be sued the
23 complaint falls.

24 THE COURT: All right.

25 MR. NEIER: Thank you, Your Honor.

1 THE COURT: Thank you. All right. Let me hear from
2 the Trustee.

3 MR. RIGANO: Thank you, Your Honor. Your Honor, I'd
4 like to take a step back for a moment and discuss the
5 relationship between Mr. Sledziejowski and Mr. Kulczyck
6 because it's a little bit more important than what defendant
7 has revealed here today.

8 As a part of the complaint Mr. Kulczyck went to high
9 school with Mr. Sledziejowski's ex-wife. Mr. Kulczyck and
10 Mr. Sledziejowski developed a long-time relationship. In 2006
11 Mr. Kulczyck came up with this great idea, to re-zone farmland
12 in Poland to develop multi-unit apartment complexes. Kulczyck
13 did not have the capital to develop this project, so -- and he
14 did not want to go to his father, who was at the time the
15 richest man in Poland. He wanted to prove himself.

16 So he approached Mr. Sledziejowski on the United
17 States soil, Mr. Sledziejowski, a United States citizen, for
18 capital. Sledziejowski through TWS Investment Partners, a
19 United States entity, advanced over 12 million dollars to
20 MyPlace development on Kulczyck's behalf.

21 The 12 million dollars was advanced in four separate
22 tranches and presumably MyPlace used the 12 million dollars to
23 develop -- to re-zone and develop this property. In exchange
24 for the 12 million dollars TWS Investment Partners received
25 the debt interest whereby MyPlace was to repay the 12 million

1 dollars plus interest. In addition, Mr. Sledziejowski
2 personally received a 25 percent equity interest in TWS
3 Investment Partners.

4 Between the time when the loans were made and when
5 the assignment agreements were executed, Mr. Kulczyck came to
6 the United States to discuss these transactions. On
7 December 2nd, 2009, if we flash forward, Mr. Kulczyck and
8 Mr. Sledziejowski engaged in some email correspondence. And I
9 want to quote the email correspondence for Your Honor.

10 In paragraph 109 of the complaint, Mr. Sledziejowski
11 states to Mr. Kulczyck:

12 "You, of course, are aware that I do not have a
13 negotiating position, but at the same time I can assure
14 you that there shall be no risk related to the potential
15 claims, et cetera, of which KI is afraid because of the
16 discount."

17 Presumably, when stating "KI," Mr. Sledziejowski was referring
18 to Kulczyck Investments.

19 In response to that email, Mr. Kulczyck states:

20 "They offer 45 percent. I know it is a lot, but I
21 promise you, as we spoke, that I will compensate your
22 losses as soon as we get out of the investment."

23 By this exchange -- this exchange is critical for a
24 couple of reasons. By this exchange Mr. Kulczyck was aware
25 that Mr. Sledziejowski (a) had no bargaining position and was,

1 therefore, not negotiating at arm's length; and in addition,
2 that Mr. Kulczyck expressly made the representation to
3 Mr. Sledziejowski that he would "compensate" his losses.
4 Mr. Sledziejowski relied on his representation of his good
5 friend at the time.

6 The next day, December 3, 2009, Mr. Kulczyck
7 executed assignment agreements on behalf of MyPlace with
8 Mr. Sledziejowski on behalf of TWS Investment Partners. By
9 those agreements TWS Investment Partners, a United States
10 entity, transferred 14 -- the 14 million-dollar balance to the
11 accrual of interest in debt owed to Kulczyck Real Estate
12 Holdings in exchange for a seven million-dollar --

13 THE COURT: Yeah, I understand that. Let me ask you
14 going back to this. What I understand the Trustee's complaint
15 to be is that when Mr. Sledziejowski, Innovest, TWSIP were
16 essentially taken out of the investment by virtue of these
17 assignments and these other agreements and the payments, that
18 it wasn't a fair deal. And so we can get into exactly the
19 claims and how it's all -- but that's -- so that all happens
20 in 2009.

21 So let me just take each of the defendants
22 separately. What's the basis for jurisdiction as to MyPlace?
23 MyPlace is not part of that transaction because it's a
24 transaction between -- between Mr. Sledziejowski, his entities
25 TWSIP, Innovest on one hand, Mister -- and Mr. Kulczyck's

1 entities, Kulczyck Real Estate Holdings and, to some degree
2 that is unclear, KI and -- and the -- the two other ones and I
3 keep losing track on my cheat sheet here as to what they are.
4 But I think it's --

5 MR. NEIER: KREH.

6 THE COURT: -- KREH and KH. So I'm wondering where
7 MyPlace fits into this at all because essentially
8 they're what's being swapped.

9 MR. RIGANO: Sure, Your Honor.

10 THE COURT: So why -- I'm not sure why they're a
11 defendant and I'm certainly not sure why they are -- whey
12 there's jurisdiction against them based on a transactional
13 test that we all agree should be employed here.

14 MR. RIGANO: Well, so, Your Honor, as the defendants
15 mentioned, while the Trustee doesn't concede general
16 jurisdiction for purposes of this argument, specific
17 jurisdiction requires the rela -- the Court to review the
18 relationship between the forum of the defendants and the
19 litigation. You were talking about MyPlace in the United
20 States as the forum of the defendant and the litigation
21 itself.

22 The litigation here by the complaint, the Trustee
23 seeks the avoidance and recovery of three separate transfers.
24 There's an addition -- the turnover of unjust enrichment, et
25 cetera.

1 The three transfers at issue include the receivable
2 transfer, which we've just discussed, the purported equity
3 transfer by Mr. Sledziejowski of his equity interest in
4 MyPlace Development, as well as the Innovest transfer. And as
5 we discussed earlier, Your Honor, the Innovest transfer is the
6 transfer of 1.3 million dollars made directly to MyPlace
7 Development. MyPlace Development entered into a contract with
8 TWS Investment Partners for the acquisition of debt 12 million
9 dollars; 1.3 of that -- of the million dollars was transferred
10 by Innovest, the United States debtor, to MyPlace Development
11 and received nothing in return.

12 THE COURT: So help me put this -- the papers don't
13 focus on this, so help me put this in context. When is this
14 Innovest transfer of 1.3 million dollars to MyPlace?

15 MR. RIGANO: It occurred in one of the tranches. I
16 believe it was in 2007.

17 THE COURT: So it's before the -- essentially the
18 buyout?

19 MR. RIGANO: Yeah, correct, Your Honor.

20 THE COURT: All right. So Innovest then essentially
21 gives more money to MyPlace, right, because they've already
22 given the 12 million dollars --

23 MR. RIGANO: Part of the 12 million is part of the
24 1.3.

25 THE COURT: Okay. So part of the -- and help me

1 understand what that is because is it a loan that's just not
2 repaid? What exactly is it that you're challenging?

3 MR. RIGANO: The 1.3 million dollars was presumably
4 made by Innovest on behalf of TWS Investment Partners pursuant
5 to one of the loan agreements that was entered into by and
6 between --

7 THE COURT: Right.

8 MR. RIGANO: -- MyPlace Development and TWS
9 Investment Partners. So MyPlace Development contracted with
10 TWS Investment Partners, a United States entity, accepted 1.3
11 million dollars from that United States entity, did not repay
12 that 1.3 million dollars and we stand before Your Honor today.

13 THE COURT: But isn't that part of the -- is that
14 part of the buyout, in other words, when TWSIP assigns its
15 rights under the loan, is this one of the loans?

16 MR. RIGANO: Right, Your Honor. This is an
17 alternatively pled cause of action. So if Your Honor finds --

18 THE COURT: But I guess I'm not -- I guess I'm not
19 understanding how it's supposed to work. So if it's one of
20 the loans, I thought the Trustee's complaint was that
21 essentially you didn't give us a fair shake. When we -- you
22 owed us in excess of 12 million dollars. We didn't get that
23 back. We got a lot less back and this is just not kosher at
24 all.

25 So -- but that -- that seems to be the way the value

1 for the assignment, right? So who knows what -- I mean, for
2 purposes MyPlace is separate from Kulczyck Real Estate
3 Holdings, so I'm just -- I'm having trouble understanding what
4 that's supposed to be because, after all, it sounds like that
5 loan obligation still outstanding was just transferred.

6 MR. RIGANO: Well --

7 THE COURT: So how can you say it wasn't a fair
8 payment because, after all, it wasn't one of the ones that was
9 transferred.

10 MR. RIGANO: Because, Your Honor, the first cause of
11 action we contend is an alter ego cause of action. The
12 assignment agreements were by and between TWS Investment
13 Partners and My -- and Kulczyck Real Estate Holdings. The
14 Trustee does seek to collapse an alter ego in alter ego
15 fashion Innovest Holdings and TWS Investment Partners. In the
16 event --

17 THE COURT: See, now I'm confused. I don't have
18 anything about alter ego in the papers I have, so -- and, in
19 fact, I have in -- I don't remember if it's the opening brief
20 or the reply saying, in fact, there is no alter ego claim. So
21 I'm -- what is it that I have in front of me and what is it
22 that I don't have in front of me?

23 MR. RIGANO: Your Honor, the alter ego claim was
24 against TWS Investment Partners. That's the first claim for
25 relief set forth in the complaint. The reason why it's not

1 before you is because the defendants do not represent TWS
2 Investment Partners. The defendants have claimed that we
3 can't sue TWS Investment Partners for those purposes. That's
4 a separate issue and that's where this comes in.

5 So if we could just take a step back, the assignment
6 agreements themselves are between TWS Investment Partners and
7 Kulczyck Real Estate Holdings SAR; they're not between
8 Innovest and Kulczyck Real Estate Holdings SAR.

9 So the point is, with the Innovest transfer in the
10 event that Your Honor finds that in the un --

11 THE COURT: Well, here's the thing that I'm confused
12 about. I'm looking at the opposition -- okay, never mind. Go
13 ahead. I've got it. So explain to me again how this fits --
14 how this works.

15 MR. RIGANO: Sure. So, again, the assignment
16 agreements are -- I can back up further. The loan agreements
17 are between TWS Investment Partners and MyPlace Development.

18 THE COURT: Right.

19 MR. RIGANO: The assignment agreements are there
20 after -- between TWS Investment Partners and Kulczyck Real
21 Estate Holdings.

22 THE COURT: Right.

23 MR. RIGANO: TWS Investment Partners is not a debt.
24 TWS Investment Partners is wholly owned by Innovest, 100
25 percent shareholders.

1 THE COURT: Right.

2 MR. RIGANO: The Trustee has made allegations in the
3 complaint seeking a declaration that TWS Investment Partners
4 and Innovest are alter egos.

5 THE COURT: Right.

6 MR. RIGANO: In the event that Your Honor does not
7 decide in the affirmative for the Trustee to that claim, we
8 have a transfer made by Innovest for which Innovest was not a
9 party to a contract, for which Innovest would have provided
10 and received no consideration, and therefore, are asserting
11 that that transfer is an avoidable and recoverable fraudulent
12 transfer as against MyPlace because MyPlace actually received
13 that 1.3 million dollars pursuant to one of the loan
14 agreements.

15 And so, therefore, because MyPlace contracted with
16 the United States entity except that a payment from the United
17 States entity negotiated with the United States entity --

18 THE COURT: Is there any dispute -- does anybody
19 contest that Innovest and TWSP are -- essentially should be
20 treated as alter egos? The reason why I ask is this is --
21 this alternative theory, frankly, doesn't make any sense to
22 me. It seems to be that this loan that you're talking about
23 is one of the tranches of the loans and the loans that are
24 assigned and this whole case is about whether the assignment
25 is for fair value or not and that's what the case is going to

1 the merits of it.

2 So I'm just -- I -- it was a helpful explanation so
3 now I understand. You're saying if somehow somebody contests,
4 you know, this alter ego that you're treating each one of them
5 separately and so there's this separate transaction and that
6 seems to be avoidable.

7 But I guess my problem is then I don't really
8 understand how to read the rest of the complaint because it
9 purports to say that the assignment of all three loan -- the
10 three loans were then assigned. So I'm just having trouble
11 understanding as a practical matter how those things -- I
12 guess that's what alternative pleadings are and they are often
13 mystifying to anybody who thinks is -- as a practical matter
14 but I just don't understand how you can really square the two.
15 But I -- and you're --

16 MR. RIGANO: Your Honor --

17 THE COURT: -- your explanation is helpful.

18 MR. RIGANO: -- this is an alternative pleading,
19 Your Honor. In addition, with respect to MyPlace --

20 THE COURT: But I don't know who would contest it.
21 Certainly I think on the other side they don't care one way or
22 the other, so --

23 MR. RIGANO: Well, they have contested it, but --
24 not substantively, but procedurally based on the Delaware Code
25 and that they are claiming that TWS Investment Partners cannot

1 be sued for alter ego purposes, we disagree with that.

2 I'm sorry?

3 MR. NEIER: Superior.

4 MR. RIGANO: I'm sorry?

5 MR. NEIER: Oh, superior. Right.

6 THE COURT: I see what you're saying. All right.

7 So it all collapses down to that issue. Okay.

8 MR. RIGANO: Right.

9 THE COURT: All right. That's helpful.

10 MR. RIGANO: Your Honor, as with respect to MyPlace,
11 MyPlace is just -- they're all over these documents. They
12 negotiated these documents with Mr. Sledziejowski.
13 Mr. Sledziejowski is a United States citizen. TWS Investment
14 Partners is a United States entity. MyPlace received 12
15 million dollars from the United States entity. MyPlace
16 presumably used the 12 million dollars.

17 THE COURT: But certainly -- again, I don't want to
18 over-read Walden, but Walden has a weird set of facts that
19 talks about, you know, things happening outside the form of
20 bravada where this person sued and was a resident and said --
21 you know, at a certain point, we don't care if all you've got
22 is the residence of the party; it's not enough.

23 Now here I understand you're saying no, there's
24 context because people are reaching out to the forum. They
25 understand, but -- so let's take the things that then are

1 alleged. This is probably as good a segue as any.

2 So you've got -- you have an agreement. There
3 doesn't seem to be any dispute that the original agreement is
4 in Polish, governed by Poland law and it's for farmland in
5 Poland. So where -- what's been highlighted is the wire
6 transfer, the emails, and essentially other communications.

7 So why don't you walk through and I think we need to
8 do this defend -- well, do you agree that that has be done
9 defendant by defendant?

10 MR. RIGANO: Yes, Your Honor.

11 THE COURT: All right. So let's walk through each
12 of the defendants and what you think stacks up for that
13 defendant, so I guess MyPlace is as good a place to start as
14 any.

15 MR. RIGANO: And, Your Honor, we can go defendant by
16 defendant, but if we reserve, again, to discuss the mere
17 department doctrine --

18 THE COURT: Yeah. No, absolutely.

19 MR. RIGANO: -- because I do believe that the
20 defendants are all intertwined here. And to such an extent
21 that they -- you know, their relationship is not being ignored
22 for purposes of the jurisdiction.

23 THE COURT: Well, but the problem I have with the
24 mere department doctrine is it's in your brief, it's stated
25 and then you move on to something else. So the way I see

1 courts dealing with jurisdictional discovery because there's a
2 lot of discretion is it almost seems like a Rule 56 situation
3 where someone says, "I can't respond to your summary judgment
4 because here's what I don't know and here's what could be out
5 here and here's what I need jurisdiction. Not general
6 jurisdiction; specific items that I need to find out here's
7 the one I want to depose. Here's the kind of things I want to
8 find out."

9 And the mere department doctrine is just to sort of
10 put out there and set adrift, but there's no narrative as to
11 how it applies here. I mean, I certainly spent some time
12 thinking about what you might mean by that, but I -- but we'll
13 get to it. So let's go defendant by defendant, then we'll
14 talk about --

15 MR. RIGANO: Sure.

16 THE COURT: -- the issues of aggregation and mere
17 department.

18 MR. RIGANO: Okay. So we discussed MyPlace. Just
19 to finish up on MyPlace, Your Honor, MyPlace, again, is
20 just -- they're all over the documents. They accepted 12
21 million dollars of United States money in United States
22 dollars from a United States entity which ended up ultimately
23 becoming essentially a United States debtor with unsecured
24 creditors.

25 THE COURT: But what case law are you relying for

1 the fact that that's enough? I mean, there's a deal -- your
2 adversary says, hey, they reached out to Poland. It's not the
3 Polish people reaching out to the U.S. It's Polish real
4 estate, it's a Polish contract under Polish law, it's for
5 Polish farmland. What is it as a matter of law and case law
6 that you can rely upon the fact that, hey, this is a U.S.
7 counter-party and that's enough?

8 MR. RIGANO: Your Honor, in -- I believe it's AgoIn
9 [ph.]. It's a Madoff case that we cite in our brief. In that
10 case the customers of Madoff signed a cust -- the customer
11 agreement in France, negotiated a customer agreement in
12 France. The agreement was written in French. The only
13 different -- the only way to assert jurisdiction over this
14 defendant was for the -- if you look at the transfers made to
15 and from the defendant's account in New York, Madoff's -- that
16 Madoff would preside over, and the court held that the
17 jurisdiction there was enough that the context were enough to
18 establish jurisdiction over the defendants.

19 Even though everything happened in France,
20 everything was in France, the signing of the agreements,
21 people never entered -- the defendants never entered into
22 America, the transfers enough -- were enough, that the
23 transfers alone were enough.

24 THE COURT: But weren't there additional factors in
25 that case? In other words, they're doing business with

1 somebody who's -- who's in the United States in the sense
2 of --

3 MR. RIGANO: That's --

4 THE COURT: -- you're not buying Polish farmland.

5 You're saying, I'm giving -- I'm handing up my money over to a
6 U.S. entity to invest in the United States consistent with how
7 you see -- how you see fit.

8 So it's not merely money -- it's money entering the
9 jurisdiction to stay in the jurisdiction to be dealt with by
10 somebody in the jurisdiction. So, I mean, that seems to be
11 different.

12 MR. RIGANO: And in a similar way, though, Your
13 Honor, MyPlace has reached into the United States by taking 12
14 million dollars to funds its operations. It's similar to an
15 investor reaching to the United States.

16 THE COURT: Then you're saying anytime anybody
17 enters into a contract with anybody in the U.S. it is --
18 there's personal jurisdiction. I don't know of any cases that
19 read it that broadly.

20 MR. RIGANO: There has to be -- right, there has to
21 be a business relationship -- continuing business relationship
22 with that entity. That's what Burger King says, the United
23 States Supreme Court. And here, based on the fact that you
24 have four loan tranches, interest continues to accrue, MyPlace
25 is obligated to repay those loans. We do believe that there's

1 a continuing business relationship [indiscernible].

2 THE COURT: All right. All right. Does it matter
3 that there's two MyPlace entities? I don't know if there's
4 any daylight between -- what we've been talking about MyPlace
5 in the aggregate, but I understand there's MyPlace Z.O.O.,
6 MyPlace SKA, and we've been referring to them as MyPlace, but
7 obviously they're separate entities. Does it matter for the
8 analysis here? I haven't heard anybody put any daylight
9 between the two of them.

10 MR. RIGANO: Right. Your Honor, we do not believe
11 it matters. We believe they're the same entity. It appears
12 that MyPlace is operated -- you know, they're a multi-unit
13 apartment complex under these names. There's been no
14 distinction with respect to the loan agreements and the
15 assignment agreements with respect to these entities. So,
16 again, defendant doesn't assert that the entities are
17 different.

18 THE COURT: All right.

19 MR. RIGANO: In addition, Your Honor, one last thing
20 with respect to MyPlace. The Trustee does plead a turnover
21 cause of action here. And the Trustee's turnover cause of
22 action relates to the fact that the Trustee believes that the
23 equity transfer -- the transfer of Mr. Sledziejowski's 25
24 percent equity interest to MyPlace was not ever consummated.
25 And the Trustee's basis for these allegations are as follows.

1 The defendants attach to their motion the Elkin
2 declaration. Attached to the Elkin declaration is Exhibits G
3 and H by the share, sale, transfer agreement, which is the
4 purported agreement whereby Mr. Sledziejowski was to transfer
5 his equity interests to Kulczyck Real Estate Holdings.

6 A review of the signature pages of that transfer
7 agreement reveals that Kulczyck Holdings did not sign the
8 transfer agreement. There's no fully executed transfer
9 agreement. The payment was never made. The trustee is left
10 with an agreement simply signed by Mr. Sledziejowski. An
11 analogous situation would be in a real estate --

12 THE COURT: Well, I'm not going to get to the
13 merits, so what does it mean for jurisdiction?

14 MR. RIGANO: Well, for jurisdiction purposes
15 essentially Roman Sledziejowski, we believe, still owns 25
16 percent equity -- has a 25 percent equity interest in MyPlace.
17 And, therefore, that equity interest should be turned over to
18 the Trustee, that it's property of the estate. And certainly
19 Your Honor has worldwide jurisdiction over property of the
20 estate.

21 THE COURT: All right. Anything else on MyPlace?

22 MR. RIGANO: I believe that's all for MyPlace, Your
23 Honor.

24 THE COURT: All right.

25 MR. RIGANO: If we want to move on to Kulczyck Real

1 Estate Holdings SAR, this entity is the entity that purchased
2 and acquired the debt from TWS Investment Partners. And
3 again, Your Honor, in discussing specific jurisdiction, we
4 have to look at the relationship between a forum in the United
5 States, the defendant here Kulczyck SAR and the litigation.
6 And if we step back --

7 THE COURT: Wait. Let me step back for a second.

8 MR. RIGANO: Sure.

9 THE COURT: Which entity are you talking about?

10 MR. RIGANO: Kulczyck SAR. That's the purchaser.
11 Kulczyck Real Estate Holdings, SAR.

12 THE COURT: All right. Look -- so let's -- so it's
13 also been referred to as KREH?

14 MR. RIGANO: KREH.

15 THE COURT: All right. Let -- yeah. I'm just
16 trying to use the same labels for the same --

17 MR. RIGANO: It gets confusing, Your Honor.

18 THE COURT: -- companies. It just -- I thought that
19 was the same one you were referring to --

20 MR. RIGANO: Yes, Your Honor.

21 THE COURT: -- but just to save us all some sanity.
22 Thank you. I appreciate it.

23 MR. RIGANO: So again we have to look at the forum,
24 United States, the defendant here, KREH, and the litigation
25 itself. The litigation -- by the litigation the Trustee seeks

1 the avoidance and recovery of the receivable transfer and in
2 the event that it was consummated the equity transfer. The
3 receivable transfer was the transfer of 14 million dollars to
4 Kulczyck Real Estate Holdings SAR -- sorry, KREH, in
5 exchange -- and TWS Investment Partners received seven million
6 dollars in exchange.

7 So the critical inquiry is what were KREH's contacts
8 with respect to the fraudulent conveyance action? Under
9 Second Circuit case law where a defendant -- where defendant's
10 contacts proximately caused the damages asserted, specific
11 jurisdiction and minimum contacts are established.

12 Here that is precisely the case here. KREH entered
13 into the assignment agreements with TWS Investment Partners.
14 TWS Investment Partners is a United States entity. KREH
15 negotiated with TWS Investment Partners. He negotiated with
16 Mr. Sledziejowski knowing that Mr. Sledziejowski was a United
17 States citizen. KREH accepted the transfer from TWS
18 Investment Partners, which again was debt held by a United
19 States entity, knew that Mr. Sledziejowski was operating
20 without "bargaining position," and through its agent
21 Mr. Kulczyck --

22 THE COURT: But you're -- you're -- when you talk
23 about the new operating in that bargaining position, we're
24 blending into the merits. I don't need to start getting into
25 what people knew. I just need to get into what the contacts

1 are with the forum that relate to the suit.

2 So you say the assignment agreement is negotiated
3 with folks in the U.S., right? That seems to be where you're
4 coming from.

5 MR. RIGANO: The assignment agreement was negotiated
6 with TWS Investment Partners, a United States entity. TWS
7 Investment Partners received a 14 million-dollar equity
8 exchange -- I'm sorry, debt exchange or assumed the assignment
9 of a debt, and in exchange they sent seven million dollars to
10 a New York-based bank account.

11 THE COURT: Well, let me ask this. They make the
12 argument that even putting aside minimum contacts with the
13 suit, then you have to think about whether it makes sense in
14 terms of the second prong, which is the substantial justice
15 and fair play and all those good things.

16 So are you saying that because one of the counter-
17 parties is a U.S. counter-party, even if it's dealing with an
18 interest in Polish real estate with Polish entities and an
19 agreement governed by Polish law that it makes sense to
20 exercise jurisdiction here?

21 MR. RIGANO: Well, Your Honor, I believe if this was
22 a breach of contract action those factors will be relevant,
23 but it's not a breach of contract action. The relevant
24 inquiry is -- and the relevant causes of action here was
25 whether the transfer amounts -- the transfer itself amounts to

1 a fraudulent transfer. I mean, United States Bankruptcy Code
2 and New York state better part of the law.

3 It's the transfer itself that's at issue. That's
4 the litigation. When we're looking at the forum, the
5 defendant in the litigation, that's the litigation aspect.
6 The transfer itself. The transfer itself happened with me by
7 United States entity and a consideration was received by the
8 United States entity.

9 And it's for that reason --

10 THE COURT: But I think you and I just said the same
11 thing. I mean, I -- you're saying that it's enough that one
12 of the parties is a U.S. party and it's on one end of the
13 transaction, so whatever consideration it's gotten, it's
14 gotten. I know you're making a distinction between the
15 transfer and a contract action, but frankly I don't see it
16 because you need exchange of consideration in the contract
17 action anyway. So I'm not sure -- I mean, do you have any
18 cases that says that that -- the fact that we're talking about
19 a fraudulent conveyance case makes it -- the analysis somehow
20 just kind of unique in terms of the transfers?

21 MR. RIGANO: Well, again, I would say to you AgoIn
22 and, as well, I would also cite the Deutsche Bank, which we
23 cite in our case -- in our opposition. In Deutsche Bank
24 the -- an entity based in a foreign state is negotiating
25 acquisition of debt by email exchange. And the court held

1 that that email exchange because they were reaching out and
2 seeking a purchase of debt by that email exchange, those
3 contacts were enough because the cause of action relating --
4 related to the purchase itself. And so --

5 THE COURT: Were those emails with a party in the
6 U.S.?

7 MR. RIGANO: It was a state law cause of action and
8 so they were looking at -- it was in the United States and
9 they were looking at jurisdiction amongst the states.

10 THE COURT: Right.

11 MR. RIGANO: So similar analysis. It's no
12 different.

13 THE COURT: All right. But I guess --

14 MR. RIGANO: The question is --

15 THE COURT: -- my point is, they rely on the emails
16 being from the estate in question where jurisdiction is being
17 asserted?

18 MR. RIGANO: But again, so they -- an employee of
19 the purchaser was in a foreign state. The employee of the
20 purchaser never entered or the purchaser never entered into
21 the state in which the seller is located. The employee was
22 simply corresponding with the seller by email exchange and the
23 court held that that email exchange was enough. There was
24 some other factors as well, Your Honor. To be frank, there
25 was a couple other transactions that occurred --

1 THE COURT: But I guess my question is --

2 MR. RIGANO: -- [indiscernible] --

3 THE COURT: -- I don't know what they felt was
4 relevant about the email exchange. Is it details about where
5 the email was sent to or from? I --

6 MR. RIGANO: It was in negotiation of the purchase
7 of the debt. That was --

8 THE COURT: Not --

9 MR. RIGANO: -- [indiscernible].

10 THE COURT: That's okay. I'll look it up. I'm
11 trying to get a sense of what the email said about the
12 contacts. I know it was for the purchase of the debt but if
13 the email was sent from, you know, Turgyestan [ph.] it
14 certainly wouldn't be relevant to contacts with the foreign
15 states. So I'm trying to figure out what in case of -- I'll
16 look at it after we -- after we're done here.

17 So all right. So we've -- anything else on KREH?

18 MR. RIGANO: Your Honor, no. Other than the fact
19 that, again, Mr. Sledziejowski relied on Kulczyck's
20 representations when reaching out to him with the email
21 exchange that he would compensate his losses.

22 THE COURT: But what is the email exchange here?
23 It's in the complaint. I don't have the email. I don't know
24 where the email was sent to. I don't know where the email was
25 sent from.

1 MR. RIGANO: But it was certainly sent to
2 Mr. Sledziejowski on behalf of TWS Investment Partners. TWS
3 Investment Partners --

4 THE COURT: I don't know where it was sent. I don't
5 have it. So I know somehow it was communicated to him.
6 Mr. Sledziejowski seems to have had quite a few entities and
7 quite a few irons in the fire, so I don't know if he has
8 Polish counsel. I don't know if he has -- I have no idea. So
9 what is it you want me to take from the emails as pled in the
10 complaint?

11 MR. RIGANO: The fact alone that the defendants knew
12 that they were negotiating with Mr. Sledziejowski who is a
13 United States citizen with respect to United States debt that
14 was extended by a United States entity.

15 THE COURT: But my problem is that that seems to be
16 what you consistently are getting back to and I just -- I'm
17 not aware of cases where that seems to be enough. Again, I --
18 my understanding is you sort of, look at -- you aggregate the
19 contexts and the contacts in the foreign estate and it -- for
20 however precise the cases talk about it, it's not quite that
21 precise. And you look to see whether they are reasonable and
22 they pass both of the prongs.

23 But the test you're asking me to adopt seems to be
24 saying that if there's a U.S. counter-party and something
25 happens, some consideration is sent from or to that that's

1 enough. Well, if there's a U.S. counter-party there's always
2 going to be something sent to or from, so then that just means
3 that jurisdiction should be based on the fact that there's a
4 U.S. counter-party and I'm not aware of any case law that is
5 that expansive.

6 MR. RIGANO: Your Honor, I will say to that the
7 Trustee has also -- if Your Honor is having hesitation with
8 this, the Trustee has also requested the right to take
9 jurisdictional discovery. And as Your Honor is aware, over
10 the past two months the landscape of this case has changed.
11 Your Honor has entered an order compelling Mr. Sledziejowski
12 to comply with his obligations to the Trustee. In addition,
13 the Trustee has recently settled causes of action with
14 Mr. Sledziejowski. Recently, in fact, Mr. Sledziejowski has
15 met with the Trustee's counsel face to face, had several
16 discussions regarding the causes of action at issue here, as
17 well as defendant's context.

18 So, Your Honor, we would request if Your Honor is
19 having hesitation with this with respect to where it said the
20 email was sent, the right to take jurisdictional discovery as
21 Mr. Sledziejowski may be able to provide clarity on those
22 issues.

23 THE COURT: All right. Well, let's get through the
24 rest of the defendants. Anything else on KREH?

25 MR. MANISCALCO: Your Honor, could I just add a

1 piece to that?

2 THE COURT: Well, I'm hearing from one person --

3 MR. MANISCALCO: Okay. Sorry.

4 THE COURT: -- and then you can converse at the end
5 and give me what you've got.

6 So anything else? We've talked about KREH I think.
7 Anything else that we -- you wanted to discuss in connection
8 with that entity?

9 MR. RIGANO: Sure. I mean, Your Honor, we also do
10 understand and we do plead throughout the complaint that
11 Mr. Kulczyck presumably on behalf of KRH did -- and the other
12 defendants as well did appear in New York to discuss these
13 transactions with Mr. Sledziejowski.

14 THE COURT: Where -- what part of the complaint are
15 we looking at for that?

16 MR. RIGANO: Paragraph 37:

17 "Defendant Kulczyck visited Sledziejowski in the
18 United States on numerous occasions socially and for
19 business purposes."

20 THE COURT: Yeah, but that's a general juris -- I
21 agree with the defendants. As stated that's a general
22 jurisdiction kind of an allegation. I -- you know --

23 MR. RIGANO: Right.

24 THE COURT: They've known each other forever and
25 that sort of cuts both ways.

1 MR. RIGANO: But again, Your Honor, with respect,
2 the landscape of the case changing, as I just mentioned,
3 Mr. Sledziejowski certainly will provide, we believe anyway,
4 additional clarity with respect to Mr. Kulczyck's contacts
5 relating to that.

6 THE COURT: All right. All right. Anything else as
7 to KREH?

8 MR. RIGANO: That's it, Your Honor.

9 THE COURT: Okay. So let's move on to the next
10 entity.

11 MR. RIGANO: If we take, let's say, Kulczyck
12 Holding.

13 THE COURT: All right.

14 MR. RIGANO: Kulczyck Holdings, the contact with
15 respect to Kulczyck Holdings is Kulczyck Holdings made the
16 payment on behalf of KREH to Innovest bank account in New
17 York.

18 Moving to the mere department doctrine here, Your
19 Honor, under the mere department doctrine courts look at a
20 couple factors to determine if the controlled entity was a
21 shell for the alleged controlling party. Those factors are as
22 follows. There exists -- whether there existed a common
23 ownership --

24 THE COURT: Well, I have them in the briefs.

25 MR. RIGANO: Okay.

1 THE COURT: So what is it that you want me to take
2 from -- with that doctrine in this context? How do you
3 connect the dots? Who is it relevant to and why for purposes
4 of the jurisdictional analysis?

5 MR. RIGANO: Well, essentially here you have KREH
6 entering into contracts obtaining debt of 14 million dollars.
7 And we have another entity, so it's -- just named Kulczyck
8 Holdings, which is a name in both entities, paying for that
9 debt, paying for Kulczyck KREH's obligations.

10 THE COURT: All right.

11 MR. RIGANO: There's clearly a financial dependency
12 between the two parties. There's ownership between the two
13 parties as alleged in the complaint.

14 THE COURT: All right. So for your purposes I could
15 aggregate the context dealing with the real estate company
16 NKH, right, those two entities.

17 MR. RIGANO: Right.

18 THE COURT: One is acting on behalf of the other.
19 That -- okay, that -- I understand where you're coming with
20 that.

21 So are there any other applications in your mind of
22 the doctrine to this case?

23 MR. RIGANO: With respect to Kulczyck Investments,
24 Your Honor, same issue. Kulczyck Investments list KREH on its
25 website. I actually have a printout of the website here for

1 Your Honor today if you'd like to see it.

2 THE COURT: Well, but what if -- if KH paid the
3 debt, I understand how they're acting -- taking an action in
4 connection with these transactions, but if they are doing
5 that, then Kulczyck Investments -- so what is it that they
6 would be doing and why would they be -- I mean, maybe somebody
7 is a parent, maybe somebody is a subsidiary, but who cares if
8 they're not involved --

9 MR. RIGANO: Right.

10 THE COURT: -- so I don't think a mere department
11 doctrine just captures subsidiaries or parents automatically.
12 It has to be some level of involvement.

13 So what is it that they would -- how would that
14 apply here?

15 MR. RIGANO: Your Honor, going back to the email
16 exchange between Mr. Sledziejowski and Mr. Kulczyck, as
17 alleged in paragraph 109 of the complaint, Mr. Sledziejowski
18 states to Mr. Kulczyck in the email exchange:

19 "You, of course, are aware that I do not have a
20 negotiating position, but at the same time I can assure
21 you that there shall be no risk related to the potential
22 claims, et cetera, of which KI is afraid because of the
23 discount."

24 KI, presumably Mr. Sledziejowski is referring to
25 Kulczyck Investments. Clearly, Mister --

1 THE COURT: That's all you've got? I mean, I don't
2 know what to make of that. I don't know if Mr. Kulczyck moves
3 his money around. I have no idea. I don't know if there was
4 an investment advisor, but did -- do we have anything that
5 they did in any of these transactions?

6 MR. RIGANO: This is the extent of it, Your Honor.
7 I will say under the mere department doctrine since all the
8 facts relating to this are in defendant's possession, we
9 should take the -- have the opportunity to take jurisdictional
10 discovery to determine whether, in fact, Kulczyck Investments
11 is the mere department -- I'm sorry, KREH is the mere
12 department of Kulczyck Investments. This taken --

13 THE COURT: Well, but I'm still -- I'm still -- let
14 me just get the text out in front of me here.

15 MR. RIGANO: It's page 19 of our --

16 THE COURT: Thank you. I think it -- this is
17 talking about asserting jurisdiction as somebody who is -- an
18 entity is a mere department entity over which the court has
19 personal jurisdiction. So -- but I guess I'm still trying to
20 figure out what it is and maybe we've segued almost into a
21 12(b) (6) kind of argument, but what it is that KI is alleged
22 to have done? I mean, has KI wronged the plaintiffs, is the
23 question, right? So I don't know that the mere department
24 doctrine is that fuzzy. I think it basically says, all right,
25 I know I have jurisdiction over you, but I'm not sure I have

1 jurisdiction based on various things over you, a party to the
2 lawsuit because I've made allegations against you, but I can
3 invoke the mere department doctrine because I have
4 jurisdiction over one of you and you're all involved. I'm not
5 even sure that KI is -- there are allegations here that it's
6 involved.

7 So I mean, I think there's some difference of
8 opinion between the parties as to who actually made the
9 transfer so -- but --

10 MR. RIGANO: Your Honor, I don't believe there is a
11 difference of opinion with respect to the transfer. The
12 transfer was made by KH.

13 THE COURT: KH. All right. So I'm just trying to
14 figure out where KI is -- comes into -- is a player here other
15 than another related entity.

16 MR. RIGANO: So, Your Honor, in the allegations of
17 the complaint the Trustee alleges:

18 "Upon information and belief defendant Kulczyck
19 owns, controls and directs all or substantially all
20 business transactions on behalf of defendant KREH."

21 That's paragraph 42.

22 THE COURT: Right.

23 MR. RIGANO: "The Trustee alleges upon information
24 and belief," paragraph 47. "Defendant Kulczyck owns,
25 controls, directs all or substantially all business

1 transactions on behalf of defendant KI; therefore, we have the
2 "interlock" -- the financial -- I'm sorry -- "the same common
3 ownership and presence, as well as the corporate formalities
4 between the parties."

5 THE COURT: That's fine, but I still don't
6 understand that they did anything, so --

7 MR. RIGANO: Well --

8 THE COURT: I mean, I get it. You have an email
9 that says that they're mentioned and maybe you just don't know
10 where they fit into the puzzle.

11 MR. RIGANO: Well, it's clear that Mr. Kulczyck was
12 negotiating on behalf of Kulczyck Investments and the other
13 parties as well. There -- it's essentially -- the parties are
14 so intertwined, the Kulczyck parties are so intertwined
15 that --

16 THE COURT: I've got to say, I'm really -- I'm --
17 that's awfully thin. That's really awfully thin. I mean,
18 you -- because you have entities who are named in these
19 agreements and you have entities who have made the transfers
20 and I just -- for jurisdiction you have to say what did they
21 do to avail themselves of the four. I mean, if Mr. Kulczyck
22 is talking about KI and having musings with them, I don't know
23 that -- it's still been established that they're involved in
24 the transaction, which you need to do for specific
25 jurisdiction. So that email doesn't do that.

1 MR. RIGANO: Your Honor, taking it back, though, if
2 we could again go back to the discovery point --

3 THE COURT: No, I understand the discovery point.
4 I'm just trying to figure out what we actually have --

5 MR. RIGANO: I understand, Your Honor.

6 THE COURT: -- versus what's aspirational. And
7 what -- to translate what I hear you saying -- and you don't
8 have to respond to this -- is that you really don't know what
9 much about KI, that they're mentioned in the email and that
10 that's where you find yourself and that's not surprising given
11 that the Trustee has filed this. It's not a suit brought by
12 the counter-party; it's brought by the Trustee. So I think I
13 understand.

14 All right. So what other entities haven't we
15 covered?

16 MR. RIGANO: I think it's just Mr. Kulczyck himself.

17 THE COURT: All right.

18 MR. RIGANO: Mr. Kulczyck was -- negotiated these
19 deals and Mr. Kulczyck came to America to visit
20 Mr. Sledziejowski. He was the party wearing multiple hats on
21 behalf of all these defendants. Mr. Kulczyck when it came to
22 pension with Mr. Sledziejowski, Mr. Kulczyck was the one that
23 came up with the MyPlace --

24 THE COURT: Well, how is the pension account
25 relevant here?

1 MR. RIGANO: I mean, that's general jurisdiction. I
2 mean, unless you're saying that the pension account is money
3 used to or from somewhere in some of these deals, I don't know
4 that that's -- Your Honor, I do want to focus on specific
5 jurisdiction at this point if we could get to the general
6 point with respect to Mr. Kulczyck in a bit.

7 So take the pension account aside, the fact is that
8 Mr. Kulczyck essentially negotiated, executed, effectuated,
9 consummated all the transactions at issue here on behalf of
10 himself and the various entities. He was a business partner
11 at MyPlace with Mr. Sledziejowski. He came to the United
12 States to negotiate these transactions with Mr. Sledziejowski.

13 THE COURT: Well, I earlier had that he came to the
14 United States for business dealings, but I don't have through
15 this deal. Do you have that allegation somewhere?

16 MR. RIGANO: That's the allegation that will -- that
17 would --

18 THE COURT: All right. But that's not the same
19 thing. So I understand this dovetails within discovery, but I
20 mean you've just got to be precise. I understand you're
21 saying that you don't know precisely what his visits to
22 America were, they have business dealings. Maybe their
23 dealings over here -- I understand. All right.

24 MR. RIGANO: And he entered into at least seven
25 different contracts on behalf of KREH and MyPlace Development

1 with TWS Investment Partners seeking the exchange of 12
2 million dollars of debt and then going the other way, 14
3 million dollars caused -- presumably caused a seven million-
4 dollar wire transfer to be made to a New York bank account.
5 These are multi-million-dollar transactions, Your Honor. This
6 is not a \$100,000 transaction.

7 THE COURT: All right. But essentially that the
8 allegation in the complaint is that he came to the U.S. for
9 business, essentially.

10 MR. RIGANO: Correct, Your Honor.

11 THE COURT: All right. All right. I think we've
12 covered a lot of the aggregation and your department issues.
13 Anything else that you want to say on those?

14 MR. RIGANO: Your Honor, I believe that is all with
15 respect to the specific jurisdiction.

16 THE COURT: All right.

17 MR. RIGANO: Your Honor, I would say, though, with
18 respect to general jurisdiction and again bringing it back to
19 the -- to Mr. Sledziejowski's information that he recently
20 provided to the Trustee, Mr. Sledziejowski did recently inform
21 the Trustee that Mr. Kulczyck, in fact, worked in America for
22 at least a year around the time of this critical period. In
23 fact, Mr. Sledziejowski advised that while --

24 THE COURT: Well, I don't have any of this in front
25 of me, so here's what I -- I don't know exactly how to do

1 this. I don't want to lead to more back and forth, but what
2 I -- this sort of gets to what I was going to ask you at the
3 end of the personal jurisdiction issue, which is what is it
4 that you think is appropriate discovery; is it discovery of
5 Mr. Sledziejowski, is it discovery of the defendants, is it
6 documents. You're telling me that there's enough stuff of
7 Mr. Kulczyck being here and mention of his entities, so what
8 is it that you would be asking for?

9 MR. RIGANO: Essentially, Your Honor, we would be
10 seeking discovery from Mr. Sledziejowski and Mr. Kulczyck on
11 all these issues.

12 THE COURT: All right.

13 MR. RIGANO: With respect to their contacts, with
14 Mr. Kulczyck and all the defendants' contacts with America.

15 THE COURT: All right. Well, all the contacts with
16 America, that's general jurisdiction, or all the contacts with
17 America as to these deals?

18 MR. RIGANO: Both, Your Honor.

19 THE COURT: And your basis for seeking general --
20 essentially discovery in general jurisdiction at this point
21 is --

22 MR. RIGANO: The fact that Mist -- we have now
23 become aware that -- first off, the relationship between
24 Mr. Sledziejowski and Mr. Kulczyck is such that they were
25 friends for a long period of time. We've recently learned

1 that Mr. Kulczyck worked in America, may own property in
2 America, visited America regularly, took private jets to and
3 from America. There's a lot of context here that the Trustee
4 just simply doesn't know based on --

5 THE COURT: All right. I've got to say, I
6 understand where you're coming from. It is frustrating to
7 have to deal with this stuff on the fly, as opposed to sort of
8 knowing where you're coming from before we get in here because
9 I went back and looked as to what you asked for, for discovery
10 and it basically just says discovery. And I -- courts have a
11 lot of discretion on discovery based on my understanding of
12 the law for personal jurisdiction, but I think they're always
13 looking to get guidance from the parties and figure out what
14 is an appropriate way to proceed so that -- because personal
15 jurisdiction is submitting yourself to the burdens of
16 litigation here. And that's why the scope of litigation --
17 I'm sorry, the scope of discovery that somebody seeks I think
18 is relevant to all of this because it's -- you're submitting
19 somebody to the same burdens they have just for litigation, in
20 which case that's a lot of cases settled because people say,
21 well, now I'm in for a penny, in for a pound; I'm going to
22 have to spend a lot of money. So I don't think it's supposed
23 to work that way.

24 So do you have any suggestion on how to do this or I
25 guess your answer is what it is and I'll just hear from the

1 other side because this is obviously new to me.

2 MR. RIGANO: Your Honor, we'd seek the same -- take
3 the depositions of Mr. Sledziejowski and Mr. Kulczyck, as well
4 as getting organizational documents with respect to the
5 entities.

6 THE COURT: All right.

7 MR. RIGANO: Limited to jurisdiction.

8 THE COURT: All right. So -- all right, so I think
9 I have the answer to that.

10 So let's move on to safe harbor and anything else
11 you need to address.

12 MR. RIGANO: Your Honor, under 146(e) of the
13 Bankruptcy Code a defendant must demonstrate that it
14 transferred itself what sought to be avoided was (a) either a
15 settlement payment or in connection with the securities
16 contract; and (b) may provide to or for the benefit of a
17 financial institution.

18 The way the statute reads and the way the cases that
19 I've seen have interpreted it require the transfer itself so
20 they may provide to or for the benefit of a financial
21 institution. The only relationship of any financial
22 institution -- that any financial institution has here with
23 respect to the receivable transfer, which is the transfer of
24 debt that TWS Investment Partners to pay KREH is that KH sent
25 seven million dollars to Innovest's Bank of America account.

1 The defendant relies on that transfer and asserts that
2 Section 546 applies. But what the defendant is missing is
3 that the transfer that the Trustee seeks to avoid is not the
4 transfer made by KH to Innovest. It's the transfer of debt
5 made by TWS Investment Partners to KREH. The transfer by TWS
6 Investment Partners to KH does not involve any financial party
7 whatsoever. The transfer is not -- certainly not made by a
8 financial institution as TWS Investment Partners is a private
9 entity. It was not made to a financial institution --

10 THE COURT: But isn't it the flip side of the same
11 transaction they transferred the rights to the loan and then
12 they pay them for 50 percent of what the loan balance is?

13 MR. RIGANO: That is what the transaction is, Your
14 Honor, but a read of the statute does not suggest that that
15 situation falls and is precluded from -- precludes the
16 transfer of debt from avoidance. The statute states that the
17 transfer itself that is sought to be avoided must be
18 transferred by, to or for the benefit of a financial
19 institution. That doesn't happen here.

20 And defendants do not cite a single case that
21 support the conclusion that somehow the transfer going the
22 other way precludes the entire transaction from avoidance.

23 Further, Your Honor --

24 THE COURT: All right. What's -- what case law
25 would you rely on for that?

1 MR. RIGANO: There is no case law, Your Honor. This
2 is -- there's no case law that states that a transfer made to
3 a financial institution insulates an entire transaction from
4 avoidance. The writ of the statute, the circling [ph.] of the
5 statute states that the transfer itself has to have been made
6 to, by or for the benefit of the financial institution. And
7 courts have construed the terms "for the benefit of" by
8 meaning that the parties to the transaction intended to
9 benefit the financial institution.

10 Parties to the transaction did not mean to benefit
11 Bank of America. The parties -- the transfer itself
12 certainly, but debt being paid -- being assigned to KREH
13 certainly the parties did not intend to benefit any financial
14 institution, for that matter.

15 Taking a step back, Your Honor, this is simply just
16 a transfer of debt between friends. There was two private
17 entities, two private individuals and that's it. It's just
18 that simple.

19 In addition, Your Honor --

20 THE COURT: Well, I -- I have a problem with that
21 characterization. We've got a whole bunch of corporate
22 entities that are sued here and parties on each side, so I --
23 you can't -- no one has given me any basis to completely
24 disregard the corporate forum and consider this to be a
25 transaction between Mr. Sledziejowski and Mr. Kulczyck solely,

1 so I don't know what you want me to do with that notion of
2 it's between the two friends. I don't --

3 MR. RIGANO: Well, Your Honor, it just goes to the
4 point that in this 546(e) case is that the courts discussed to
5 risk these avoidance actions being brought in the financial
6 arena causing ripple effects throughout the global economy and
7 causing a global economic meltdown.

8 THE COURT: Yeah. No, I'm aware of that. I mean,
9 you -- I wrote a lot of its report about this, but I think
10 people agree that it's overbroad and people are debating on
11 how to change it to not capture as much, but I think it's
12 pretty clear that it captures more than a lot of people think
13 it should as of the moment, so I don't know that I can
14 necessarily ignore the language of the statute, even if -- you
15 know, under the guise of saying it's all about systemic risk,
16 as tempting as that is.

17 So do you rely on any particular cases that you want
18 me to look at for purposes of how to construe the statute the
19 way you want me to construe it?

20 MR. RIGANO: Your Honor, I'm not sure that the cases
21 discuss this issue.

22 THE COURT: All right.

23 MR. RIGANO: This particular issue. So
24 unfortunately, I'm not sure that we could provide guidance,
25 Your Honor, in that matter. But again, I would refer to the

1 strict reading and interpretation of the statute where the
2 statute does state that the transcript that is precluded from
3 avoidance is the transfer made by, to or for the benefit of a
4 financial institution. It doesn't say the entire transaction
5 is precluded from avoidance. It says the transfer.

6 THE COURT: All right.

7 MR. RIGANO: In addition, Your Honor, the defendant
8 states this is a settlement payment for payment made, the
9 payment of debt by TWS Investment Partners. The Trustee
10 disagrees for a couple of reasons. First off, the defendant
11 cites no case supporting the conclusion that the agreement
12 itself -- the transfer of debt itself could be considered a
13 settlement payment. Settlement payments have been construed
14 by courts to mean actual payments of cash and defendant cite
15 cases supporting that conclusion in their brief.

16 Secondly, Your Honor, a settlement payment suggests
17 some kind of conclusion to a transaction, settling a
18 transaction. What Mr. Kulczyck stated that to
19 Mr. Sledziejowski that "I will compensate your losses" in that
20 email exchange, it's clear that Mr. Kulczyck and
21 Mr. Sledziejowski did not intend for this to be a settlement
22 payment. It was just a payment on account. There was a
23 future payment to be made later. And I know this is not
24 before Your Honor, but Mr. Sledziejowski has informed the
25 Trustee that after the fact, after --

1 THE COURT: Can you cite to anything in the
2 agreement that provides for that?

3 MR. RIGANO: The agreement themselves, no, Your
4 Honor, but the email -- the --

5 THE COURT: I know, but I don't get -- I don't get
6 to an email as evidence of what a contract says unless the
7 contract -- unless there's certain requirements met, the
8 contract is ambiguous, right, you read the contract first if
9 you can make -- make heads or tails of it in terms of what
10 it's supposed to provide. Intrinsic evidence is -- there has
11 to be a reason to go to intrinsic evidence.

12 So what -- is -- are you making a pitch on that?

13 MR. RIGANO: Well, Your Honor, this is a -- this is
14 not a breach of contract claim. This is a Chapter 5 avoidance
15 claim. And so under Chapter 5 --

16 THE COURT: I know that, but it's -- but you just
17 said that the agreement contemplates additional payments, so
18 you can't have it both -- you can't have it both ways. I
19 mean, so I have to deal -- you keep saying it's not a contract
20 case, but it's all about the transactions that are governed by
21 these agreements and then things happen consistent with those
22 agreements.

23 So I don't know that you can take all the agreements
24 and throw them out and say it is whatever it is. I --

25 MR. RIGANO: Your Honor, I think it's different in

1 this case because this is -- again, this is a fraudulent
2 transfer action. So the critical inquiry is -- one of the
3 inquiries is the bar in the position of the parties and what
4 the parties expected to be exchanged and otherwise. And here
5 what the parties expected to be exchanged is set forth in
6 those emails. This is not the matter of an interpretation of
7 a --

8 THE COURT: So when I'm construing a settlement
9 payment, I -- you're allowed to recast the agreement however
10 you -- based on the allegations of the complaint?

11 MR. RIGANO: Well, I think the intention of the
12 parties is important when determining whether payment is a
13 settlement or not.

14 THE COURT: All right. All right. Let's -- I think
15 we can being to wrap it up. Anything else that you need to
16 address?

17 MR. RIGANO: Well, with respect to 546(e), Your
18 Honor, I would just point out that the defendants do not
19 appear to assert that 546(e) applies to the equity transfer
20 and Mr. Kulczyck's interest in KREH nor do they, I think
21 anyway, assert that the Innovest transfer of 1.3 million
22 dollars to MyPlace Development is insulated by 546(e). And so
23 we don't believe that 546(e) applies to the release of
24 transfers as well.

25 As for turnover, Your Honor, I think we mentioned

1 earlier the Trustee believes that the transaction was never
2 consummated. With respect to the equity transfer, the
3 agreement was not signed by Kulczyck, but -- KREH anyway. The
4 agreement does not appear to have been consummated because no
5 payment was ever made. For those two facts we believe that
6 Mr. Sledziejowski is the holder of a 25 percent equity
7 interest in MyPlace Development and the Trustee has a right to
8 assert turnover of that equity interest under the complaint.

9 And finally, Your Honor, I just want to touch on the
10 TWSIP issue the defendant has raised. Under defendant's
11 theory essentially TWS Investment Partners cannot be sued
12 because of the Delaware Secretary of State issued a
13 certificate of cancellation. However, as stated in our brief
14 under Section 18, 1107(m) of the Delaware Code, the Delaware
15 statute permits entities to be sued, defendant selfing suits
16 [ph.]. It doesn't void any contracts. Talks about all the
17 different things that were not effected, do not effect an
18 entity that fails to pay their franchise taxes to the Delaware
19 Secretary of State.

20 It's undisputed that the sole reason why the
21 Delaware Secretary of State issued the certificate of
22 cancellation on TWS Investment Partners is because TWS
23 Investment Partners failed to pay its franchise taxes. In
24 addition, I'm not sure what defendant said he needs to assert
25 and he claims on behalf of -- or defense on behalf of TWS

1 Investment Partners. And finally, Your Honor, if it truly is
2 a huge issue, the taxes, I'm sure the Trustee can arrange for
3 the payment upon a proper application to Your Honor of the
4 taxes that are due and owing. I believe there's something in
5 the nature of less than \$2,000.

6 THE COURT: All right. Thank you very much.

7 MR. RIGANO: Thank you, Your Honor.

8 MR. NEIER: Very briefly, Your Honor. When you make
9 an investment in a company overseas that obviously does not
10 creating jurisdiction here in the United States. If I make an
11 investment in a completely different foreign entity, I got to
12 Poland but I make an investment in a Polish entity, that's not
13 going to be governed in the United States just because I am a
14 U.S. citizen and I made that investment.

15 The going case, which Mr. Rigano cites, was
16 investments here in the United States. And as far as the
17 investors knew, it was investments in U.S. stocks that were
18 going to be made. Of course, Mr. Madoff had other plans for
19 the money, but that was the intent of those investments.

20 Burger King was a franchise relationship for 20
21 years. The Deutsche Bank case is a New York long-arm statute
22 case, really not relevant to this debate, but it's a New York
23 long-arm statute case from 2006 so it might be effected by
24 Walden. As I said earlier, if Walden has any change in laws
25 it's that the long-arm statute might be impacted there.

1 THE COURT: Is that a doing-business case?

2 MR. NEIER: It's a doing-business Montana -- I
3 believe it's a Montana entity that is the purported defendant
4 there. It's not even a case involving foreign entities.

5 The sheriff sale agreement -- so the sheriff sale
6 agreement, which is attached to the Elkin deposition -- or
7 excuse me -- sorry, the Elkin declaration, it's true we don't
8 have an executed copy. We provided it to bring it to the
9 Trustee, by the way, and this is the copy that we have. We
10 can look for other copies with a signature, but I would just
11 point out, it's an agreement. It sells the equity for 2,500
12 zlotys. It says, zloty. If you have a problem, the agreement
13 is governed by the laws of Poland. There's a consent to
14 jurisdiction in Poland and the agreement, in essence, could be
15 signed today. We have 2,500 zlotys to the Trustee and the
16 matter would be over. The Trustee stands in the shoes of the
17 person contracted for this, so it's not like they can undo the
18 investment.

19 And by the way, I'd just point out to the Trustee, I
20 don't know a lot about the history of Mr. Sledziejowski. I
21 think the Trustee and the Court probably have a lot more
22 history than we do, but if Mr. Sledziejowski's investments
23 really resulted in a windfall this would probably be
24 unprecedented compared to his other dealings.

25 THE COURT: Now, I don't know what that gets me.

1 What about the Trustee's position here today about discovery
2 based on things Mr. Sledziejowski has said about trips to the
3 United States and things of that sort?

4 MR. NEIER: Well --

5 THE COURT: If -- I understand you do not want
6 jurisdictional discovery, but --

7 MR. NEIER: That's correct, Your Honor.

8 THE COURT: -- but humor me for a second and say
9 that if for one, what's your response to the request for
10 jurisdictional discovery of the type discussed here today;
11 and, two, if some discovery were to go forward on his contacts
12 with the U.S., what should it look like. Again, I realize
13 it's --

14 MR. NEIER: Right.

15 THE COURT: -- kind of a loaded question, which is
16 to say, I don't agree, I don't agree, but if you did agree
17 what would it look like. So I -- you can take the Fifth on
18 the second one, if you want.

19 MR. NEIER: Not take the Fifth. So I think Your
20 Honor noted in the Arcapita case that jurisdictional discovery
21 is not necessarily the way to go, but if you were to go that
22 way, then Mr. Sledziejowski is obviously subject to the
23 jurisdiction of the Court. And if the Trustee wants to notice
24 a deposition, then with respect to jurisdiction I suppose we
25 could attend that.

1 But with respect to the other defendants they are
2 not resident here in the United States and the Trustee would
3 have to obtain discovery of them overseas in order to do that
4 jurisdictional discovery. As you noted earlier, it's not fair
5 to take foreign entities and individuals and subject them to
6 the burdens of U.S. litigation when they haven't consented to
7 the jurisdiction of this forum, nor have they had minimum
8 contacts and the Trustee is now seeking to discover minimum
9 [ph.] conducts.

10 THE COURT: Right.

11 MR. NEIER: It's inherently unfair to make them
12 appear -- to -- it's one thing to appear here through lawyers
13 and argue personal jurisdiction; it's quite another thing to
14 make them subject to the burdens of U.S. discovery so the
15 Trustee could discover jurisdiction --

16 THE COURT: Well --

17 MR. NEIER: -- so that discovery should take place
18 overseas --

19 THE COURT: But again, to use --

20 MR. NEIER: -- if it takes place at all.

21 THE COURT: To use --

22 MR. NEIER: Nor do I think it's fair for them to
23 happen at all.

24 THE COURT: Yeah. Well, I guess my thought is, if
25 discovery were to happen it would have to be limited, so if it

1 were to be limited in order to address some of the concerns
2 you've raised, how should it be limited? In your mind, would
3 the -- would there be documents that could be provided, is
4 there -- and maybe you want to think about it before you
5 answer that question. I --

6 MR. NEIER: I think you are correct, Your Honor,
7 when you said that this is on the fly. And it's not in
8 writing, so obviously I'd have to take back any request of
9 proposal to the clients to find out what there is. We have
10 provided documentary evidence to the Trustee. All the
11 documents that are in the Elkin declaration are documents we
12 provided to the Trustee upon request --

13 THE COURT: Right.

14 MR. NEIER: -- from the Trustee, so --

15 THE COURT: No, I know but oftentimes and certainly
16 was the case in Arcapita where there was a declaration from
17 defendant that said, we just want to make it exactly clear
18 how -- what the context or lack thereof are with the United
19 States. And so you had a declaration that said amount of
20 offices in the United States, zero; amount of time spent in
21 business and -- you know, it says zero. There were some
22 statements that -- you're not required to do that, so I'm not
23 trying to say that. But when thinking about the issue of
24 discovery it certainly is somewhat relevant and it makes it --
25 I think it's a factor the courts consider in deciding what

1 they should do on a request like this. So --

2 MR. NEIER: I appreciate that, Your Honor. And I
3 would certainly take back any suggestion -- it's still on the
4 fly -- but take back any suggestion to the clients. But I --
5 you know, I would point out that there's a big difference as
6 to when you submit a declaration now the Trustee is asking for
7 depositions. That's a --

8 THE COURT: No, I --

9 MR. NEIER: -- entirely different --

10 THE COURT: I recognize that, but I think people
11 sometimes submit declarations just because they don't want to
12 have to deal with discovery, right?

13 MR. NEIER: Right.

14 THE COURT: So, again, you're not required --

15 MR. NEIER: We didn't do that here.

16 THE COURT: You're not -- no, you're not required to
17 do it but it does -- people do it. It's a strategic question
18 as to whether you want to do that or not and, you know, if I
19 don't have them, I don't have them and I just consider it
20 without it.

21 So here's what I'd like to do on that point is I'd
22 like to ask the Trustee to submit a letter in the next week
23 that says just for purposes of the record because, again, I
24 don't think I have a request on the record for the -- with the
25 specificity of what you're talking about today in terms of

1 what Mr. Sledziejowski said and your basis for it. Letter
2 can't be any longer than two pages on the issue of what you
3 think should happen to discovery if that's the path that I
4 take. And then I'll give you a week to respond to it and then
5 that way people have a chance to think about what they want to
6 do. They even have a chance to have a discussion to the
7 extent that people say, Judge, we don't think you need to get
8 there, but if you do this is what the parties have worked out.
9 I mean, there's lots of different ways to do it in strategic
10 considerations to go into all that, so I don't want to put
11 anybody on the spot.

12 And I did put you on the spot, so this way you get a
13 chance to think about it a little bit more. And if you want
14 to refine it a little bit more, tweak it, your request for
15 discovery, you can do that as well or you can stand by what
16 you did today and just repeat that. That's fine. But --

17 MR. NEIER: Well, I will just finish up, Your Honor,
18 by saying the Trustee did say in its opposition that it could
19 give rise to a mere department doctrine. It didn't actually
20 assert the mere department doctrine, as it is here today, and
21 they quite the Lehman case where the court said -- this is
22 Judge Chapman's case, I should say -- "A court may assert
23 jurisdiction where there's a subsidiary amenable to
24 jurisdiction that is a mere department of the parent defendant
25 or where there's a subsidiary depart -- defendant that is a

1 mere department of a parent amenable to jurisdiction." We can
2 go through all the discovery you want, but at the end of the
3 day there is no subsidiary of Kulczyck that is in the United
4 States of the Kulczyck -- the investments Kulczyck opens KREH
5 entities. I don't think -- and I don't think Mr. Kulczyck has
6 any children, so they can't be subsidiaries either.

7 The Trustee also says that under 546(e) we didn't
8 assert that the sheriff sales agreement was covered by 546(e).
9 We did assert that. It's in our opposition brief. The
10 beginning of it -- the first sentence of our opposition
11 brief -- sorry, in our motion to dismiss, not our
12 opposition -- in our motion to dismiss was the allegations in
13 Counts II through XVI of the amended complaint brought under
14 state law by the Trustee and the Trustee's strong-arm powers.
15 All of those claims should be dismissed.

16 We later say in that -- in that section on page 10
17 of our motion to dismiss, the agreements per Simon and sale of
18 the debt and equity investments in MyPlace constitute
19 securities contracts and then we go on to discuss 546(e). So
20 we did move to dismiss what was -- with respect to the sheriff
21 sale agreements and with respect to the debt agreements.

22 With respect to the -- I think what Mr. Rigano has
23 conceded as a novel claim and we certainly couldn't find any
24 cases on it when we looked, but Mr. Rigano did refer to the
25 plain words of the statute under 546(e). I just want to make

1 the Court -- or I just want to point to the plain words. The
2 statute says -- refers to a transfer made by or to or for the
3 benefit of.

4 Now, for the benefit of -- obviously this is not for
5 the benefit of Bank of America, but it was made to Bank of
6 America. And the Krepacore [ph.] cases and the Enron cases
7 and all those other cases say that the financial institution
8 is a mere conduit. It just receives the transfer. That's
9 enough.

10 And then Mr. Rigano says, but the transfer of the
11 debt is what we're suing for. We're not transferring -- we're
12 not suing for the consideration paid for the debt. The
13 statute reads a transfer made by or to or for the benefit of
14 and then it says, "in connection with the securities
15 contract."

16 Now, "in connection with a securities contract" I
17 could buy plenty of cases that talk about that because
18 obviously every [indiscernible] case is in connection with a
19 securities contract, every payment made in connection with a
20 securities contract there is, in fact, quite a bit of law that
21 would say that a payment made in connection with a securities
22 contract is something that we're talking about.

23 So the plain words of the statute are not in
24 Mr. Rigano's favor. They, in fact, go the opposite way
25 because if you make a transfer to an institution in connection

1 with a securities contract, that's it.

2 And I don't have any further points, Your Honor. If
3 you have any questions --

4 THE COURT: No, I do not. Thank you very much and I
5 appreciate everyone's response to questions. Obviously, those
6 are things that I am working my way through. Sometimes I
7 ultimately have a point and I'm onto something. Sometimes I'm
8 not, but the reason we're asking the questions are to get a
9 response --

10 MR. NEIER: I forgot one thing I should add. The
11 two -- the motions to dismiss that are before Your Honor,
12 there is no breach of contract, breach of the sheriff's sale
13 agreement before Your Honor. So when Mr. Rigano said, we're
14 suing for return, that's not before Your Honor in this motion
15 to dismiss. There's no breach of contract action here.

16 MR. RIGANO: Your Honor, certain turnover. The --

17 MR. NEIER: Yeah, turnover, but --

18 MR. RIGANO: It was not consummated. That's the
19 Trustee's allegations.

20 THE COURT: Right.

21 MR. RIGANO: As well as --

22 THE COURT: I got it. I don't expect agreement on
23 how to characterize it. That's a bridge too far for today.

24 MR. NEIER: Your Honor, just because next week is
25 Thanksgiving can you give us one week to file the letter?

1 THE COURT: That's fine. Just work out a schedule
2 amongst yourselves. Anything that's reasonable is fine with
3 me. Just call chambers and let me know when it is. That's
4 fine.

5 MR. NEIER: Okay.

6 THE COURT: But I don't want to be the reason anyone
7 has to explain to a significant other that you can't help set
8 the table at Thanksgiving because you're writing this letter.
9 That's not a good place to be, so let's not go there.

10 So that's fine. Just work it out. Whenever you
11 submit it, yours is a week later and just pick a date. That's
12 fine. All right. Thank you very much for the arguments. I
13 thought they were very helpful.

14 ATTORNEYS: Thank you, Your Honor.

15 (Proceedings concluded at 12:57 p.m.)

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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6 RUTH ANN HAGER, C.E.T.**D-641

7 Dated: November 27, 2015

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